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IN THE

Supreme Court of the United States

October Term, 1964

KENNECOTT COPPER CORPORATION,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion, findings of fact and conclusions of law of the district court (App., *infra*, 1a-26a) are reported at 231 F. Supp. 95.

JURISDICTION

This is a civil action under Section 15 of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. § 25, to enjoin an alleged violation of Section 7 of said Act, 38 Stat. 731, as amended, 15 U.S.C. § 18. Final judgment, against the defendant (appellant Kennecott Copper Corporation), was dated and entered by the district court on November 24, 1964 (App. 27a-30a). On January 19, 1965, appellant filed a notice of appeal in the district court.

Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29, vests this Court with jurisdiction to review the judgment on direct appeal. *Brown Shoe Co. v. United States*, 370 U.S. 294.

QUESTIONS PRESENTED

In passing on the acquisition by appellant Kennecott Copper Corporation ("Kennecott") of The Okonite Company ("Okonite"), the district court found that "Okonite was interested in the merger for financial reasons. It felt it had to expand to survive and that Kennecott could supply the necessary capital" (App. 7a) and "the merger was primarily an advantage to Okonite rather than to Kennecott" (App. 23a).

The district court refused to find any violation of Section 7 with respect to insulated wire and cable, the line of commerce in which Okonite was engaged.

It did find a violation (i) with respect to "paper insulated power cable", an alleged submarket of insulated wire and cable, because both Okonite and a subsidiary of Kennecott manufactured paper insulated power cables, and (ii) with respect to the line of commerce of refined copper, in which Kennecott was engaged. The final judgment included an injunction against future acquisitions by Kennecott, and provided ancillary visitation rights to the government.

The ultimate question presented by this appeal is:

(1) Whether the district court erred in holding that the acquisition by Kennecott Copper Corporation of the assets of The Okonite Company violated Section 7 of the Clayton Act.

Subsidiary questions are whether the district court erred in holding

(a) that "paper insulated power cable" is a line of commerce within the meaning of Section 7;

(b) that the effect of the acquisition may be substantially to lessen competition in "paper insulated power cable"; and

(c) that the effect of the acquisition may be substantially to lessen competition in the line of commerce of refined copper.

A second question, which arises only if the first is answered in the negative, is

(2) Whether the district court erred in including in the final judgment an injunction against future acquisitions by Kennecott Copper Corporation, and in granting ancillary visitation rights.

A subsidiary question is:

(a) Whether the district court erred in enjoining future acquisitions by Kennecott, whether or not in violation of law, in areas unrelated to the competition found to have been affected by the acquisition by Kennecott, a producer of refined copper, of Okonite, a wire and cable fabricator, such as any acquisition by Kennecott of a company engaged in the production of refined copper, or engaged in business outside the United States.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18, provides in relevant part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT

A. The Facts

On November 24, 1958, Kennecott, a producer of refined copper, acquired the assets of Okonite (N.J.),* a fabricator of insulated wire and cable, a principal ingredient of which is refined copper. This raises what the district court described as the "vertical" aspect of the case.

Kennecott at that time had a subsidiary, Kennecott Wire & Cable Company ("KWC"), in Phillipsdale, Rhode Island, which was a very minor fabricator of in-

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* The assets of The Okonite Company (a New Jersey corporation) were acquired by The Okonite Company (a Delaware corporation), formed by Kennecott for that purpose. The business has since been conducted by the Delaware corporation. Where appropriate, these two entities will be distinguished by reference to "Okonite (N.J.)" or "Okonite (Del.)". After December 1958, Okonite (Del.) included the business of Kennecott Wire & Cable Company, referred to below.

sulated wire and cable, essentially of varieties different from those made by Okonite. In December 1958, KWC was merged into Okonite (Del.) as the KWC Division. This gives rise to what the district court described as the "horizontal" aspect of the case.

1. The "Horizontal" Facts

Both Okonite and KWC were manufacturers of insulated wire and cable, and the government charged that combining these enterprises under single ownership would violate Section 7 because of the likelihood of substantially lessened competition in the insulated wire and cable line of commerce.

In 1958, Okonite had 2.7% of domestic shipments of insulated wire and cable and KWC had 0.5%. The market share of each had been declining, and the combined operations continued to decline after the acquisition, from an aggregate of 3.2% in 1958 to 2.3% in 1962.

This decline followed naturally from the trend affecting both companies prior to the acquisition and their condition at that time. Okonite (N.J.), which had net profits after taxes of $2,363,000 in 1953, was reduced to $110,000 of profits in 1957 and a nominal $2,000 in 1958. KWC's market share had declined from 0.8% in 1954 to 0.5% in 1958.

Okonite, with a past history as a prestige company with fine products, found itself unable to make the transition from a wartime and post-war economy to a peacetime economy, where its competitors were installing more modern equipment and making more modern, lower cost products. As the district court indicated, Okonite had to

expand to survive. It also had to replace its largely obsolescent plant, and it had no money to do so.

KWC, on the other hand, did not have the management, engineering or sales personnel familiar with wire and cable fabrication who were capable of maintaining a position in the wire and cable industry.

KWC had a very old plant badly located in Rhode Island; the central point for industry sales was in the Midwest. KWC was not an important factor in the wire and cable industry.

Kennecott's acquisition of Okonite essentially brought together what was believed to be the competent personnel of Okonite and the possibility of Kennecott's supplying the financing so badly needed by Okonite. However, Kennecott's ownership of Okonite did not stem its downward trend. In the four years subsequent to the acquisition, Okonite (excluding the KWC Division) had net losses after taxes of approximately $5 million. It is doubtful whether Okonite (N.J.) would have survived as an independent company.

There was practically no competition between Okonite and KWC before the acquisition, and there was no evidence that any lessening of competition in the insulated wire and cable industry might result. Thus, while the district court noted in Conclusion of Law 2(a), as the parties stipulated, that insulated wire and cable is an appropriate line of commerce within which to measure the probable effects of the acquisition, there is no finding that the acquisition violated Section 7 because of any effect on competition in that line of commerce (App. 25a-26a).

a. Is "Paper Insulated Power Cable" a Line of Commerce?

Having found no violation of Section 7 in the stipulated insulated wire and cable line of commerce, the district court turned to a fragment of that market where the statistics give a distorted magnification of Okonite and KWC. This fragment is the court's paper insulated power cable "submarket." Thus, the first question is whether paper insulated power cables constitute a line of commerce within the meaning of Section 7.

In 1958, total shipments of insulated wire and cable, including telephone cables, magnet wire, power cable and many other varieties of insulated wire and cable, were $1,312 million. Paper insulated power cables are classified by the Census under "power wire and cable", which also includes power wire and cable insulated with different materials. Paper insulated power cables represented $39 million out of a total of $195 million of shipments of power wire and cable. Other power wire and cable products include portable power cables ($25 million), and power wire and cable insulated with varnished cambric ($10 million), rubber ($94 million), thermoplastic ($17 million), asbestos ($6 million) and "other" ($4 million).

There are four separate types of paper insulated power cables, each having different characteristics and uses.

(i) *Solid type,* which consists of a copper or aluminum conductor insulated with oil impregnated paper, covered with a lead sheath and, sometimes, with the lead sheath covered by a water-impervious protective covering; this type of construction is restricted in its upper voltage limit, and its range gen-

erally is from 1 kv (kilovolt) to 27 kv. This is the only type made by both Okonite (N.J.) and KWC.

(ii) *Gas filled type,* which has gas under pressure inside the lead sheath so that, if there is a break in the sheath, gas will flow out and water will not flow in. In some gas filled cables the lead sheath is reinforced to withstand the higher pressure by means of bronze tapes over a bedding of neoprene tapes and a neoprene tape jacket over-all. This type of cable is generally used at higher voltages than is the solid type. Okonite (N.J.) but not KWC made this type of cable.

(iii) *Oil filled type,* in which the cable is filled with oil under pressure. It is generally used at higher voltages than the solid type, or for technical reasons. This type was also made by Okonite (N.J.) but not by KWC.

(iv) *Pipe type,* where the cable, without a lead sheath, is enclosed in a pipe containing oil or gas under pressure. This type is used for high voltages up to 345 kv. It was made by Okonite (N.J.) but not by KWC.

There are separate specification books in general use for each of these four types, and the trade association collects separate statistics for "solid type" and "other types." KWC did not have the facilities for manufacturing any type except the solid type, of which its shipments were only $0.8 million in 1958.

Although solid type paper insulated power cables were once used extensively at 1 kv to 5 kv, other insulations have largely displaced paper at those voltages. At 15 kv

either rubber, plastic or paper insulation can be and is being used, the purchaser's decision being based largely on relative cost.

Utilities are the largest customers for power cable, and those using solid type paper insulated power cables generally put them in underground ducts. Paper is not water-impervious, and the utilities have been seeking substitutes which are water-impervious because of the seriousness of power failures resulting from a break in the lead sheath of solid type paper insulated cables.

The government's expert predicts that for this reason water-impervious polyethylene (plastic) insulated power cables, already in use at 15 kv and 27 kv, will soon become standard construction where paper is now being used at those voltages. 27 kv is the upper limit of the paper insulated power cables which KWC could produce, and at such voltages paper must compete with other insulations for all uses for which KWC sold such cables.

On the other hand, when a customer needs gas filled, oil filled or pipe type cables, it can not use the solid type paper cables which KWC produced. With the rapidly growing use of electricity, the market is continuously turning to power cable of increasingly higher voltages outside the useful limit for solid type paper insulated cables. Therefore, the three other types accounted for the majority of Okonite's (N.J.) sales of paper insulated power cables.

The district court thus found a so-called submarket in which the limited range of KWC products (i) was competitive with substitute products *excluded* from the district court's submarket (compare *United States* v. *Con-*

tinental Can Co., 378 U.S. 441; *Brown Shoe Co.* v. *United States, supra; United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377) and (ii) was not competitive with the gas filled, oil filled or pipe type cables *included* in the district court's submarket (compare *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586).

Paper insulated power cables are not a line of commerce within the meaning of Section 7. The government urged these products as a "submarket" because this is the only area of even insignificant overlap between Okonite (N.J.) and KWC.

However, the government apparently concedes that competition will be improved by keeping together in a single enterprise the former businesses of Okonite (N.J.) and of KWC, rather than making them separate enterprises again. The government has repeatedly urged that Kennecott divest, not the business of Okonite (N.J.) which Kennecott acquired, but Okonite (Del.), including the KWC Division, as a single entity.

The relief the government seeks because of the putting together of the wire and cable businesses of Okonite (N.J.) and KWC is that Kennecott be compelled to keep them together; thus, the government seems to agree that Okonite (N.J.) needed to expand to survive, and in effect seeks a compulsory merger of Okonite (N.J.) and KWC.

b. May the Acquisition Substantially Lessen Competition in Paper Insulated Power Cables?

The district court made its finding of illegality on the basis of just three facts:

1. The third largest seller (Okonite), with 19.6% of total sales, was combined with the eighth largest (KWC), with 2.1%.

2. The number of sellers was reduced by one.

3. The aggregate shares of the four largest companies, *i.e.*, General Cable, Phelps Dodge, Okonite (including KWC after 1958) and Anaconda, increased somewhat (but the reason was growth by Anaconda).

These three facts do not begin to tell the story, or take into account the various other factors necessary for determining the application of Section 7.* For that, we must start with a description of Okonite and KWC.

In 1958, Okonite had a reputation for quality products, able management and high engineering and research skills, but it was not able to keep up with the industry trend toward mass production of standardized types of wire and cable.

Okonite produced insulated wire and cable at three plants in New Jersey. Its Passaic plant was built in the 1880's and specialized in the production of rubber insulated power cables manufactured by the unique and costly process of wrapping strips of rubber lengthwise around the metal conductor and vulcanizing the seam. By 1958, Okonite was finding it increasingly difficult to

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* Compare this Court's admonition in *Brown Shoe Co.* v. *United States*, *supra*, that "Congress indicated plainly that a merger had to be functionally viewed, in the context of the particular industry" (370 U.S. at 321), and that "only an examination of the particular market—its structure, history and probable future—can provide an appropriate setting for determining the probable anticompetitive effects of the merger" (*Id.* at 322 n.38).

compete with the low cost products of competitors using newer and cheaper extrusion processes, and sales were declining substantially.

In 1958, Okonite's Paterson plant, built in 1925, was largely devoted to the manufacture of paper insulated power cables of all types, for voltages up to 230 kv.

Okonite and other companies (not KWC) had been conducting research on pipe type paper insulated power cables for 345 kv application, but at the time of the acquisition the Okonite facilities were not capable of commercial manufacture of such a large cable. In fact, it later appeared that Okonite was unable to manufacture certain large diameter cables, in voltages less than 345 kv, in current demand, and was removed by Consolidated Edison, the largest buyer in the country, from its approved list of suppliers for such products. Okonite's competitors had newer plants and equipment, and Okonite needed large sums of money to re-equip its plant for existing business as well as to enable it to manufacture the larger diameter and higher voltage 345 kv cable.

The Paterson plant also manufactured high quality, high cost, latex (rubber) insulated signal and control wire for defense use and for fire alarm systems. This profitable business was about to disappear on government approval of cheaper extruded polyethylene insulation as a substitute for latex.

Okonite's North Brunswick plant was purchased by Okonite in 1956. It was a large plant which had recently been built, but not used, as an assembly plant for Studebaker, and Okonite moved into it most of the equipment of its nineteenth century Wilkes-Barre plant and added some additional equipment.

Unlike the custom-built products of the Passaic and Paterson plants, North Brunswick was planned for the manufacture of standard types of insulated wire and cable by ordinary commercial methods. By 1958, it was apparent that the products of the North Brunswick plant required a type of manufacturing, selling and distribution new to Okonite, *i.e.*, long production runs and modern low cost production methods, warehousing and large inventories, as well as a different type of sales organization.

Because of the imminent loss of sales of strip insulated power cables and latex wire, its inability to produce higher voltage paper insulated power cables, with their larger diameters, and the need for much larger volume at North Brunswick, it was necessary for Okonite to expand and modernize in order to survive. Okonite's total 1958 earnings had declined to $2,000, and substantial losses were to follow in succeeding years. Okonite had already borrowed $7,000,000 to finance the purchase of the North Brunswick plant and the move to it. Okonite was not making a profit, and it had used up both its available cash and its borrowing capacity.

In 1958, KWC, located at Phillipsdale, Rhode Island, was a minor producer of insulated wire and cable with declining sales. Its principal products were telephone cables and magnet wire, which Okonite (N.J.) did not make. It also produced old-fashioned varieties of solid type paper insulated power cables for voltages up to 27 kv, but the market had gotten away from KWC and its sales of these products were only $0.8 million in 1958. Because of the illness of the president of KWC, the lack of competent management, sales, research and technical personnel, and

the fact that Rhode Island is not a geographically suitable location for a wire and cable operation since the principal market is in the Midwest, KWC was no longer a viable competitor, especially in paper insulated power cables.

There were already four insulated wire and cable producers making a full line of paper insulated power cables, *i.e.*, General Cable, Phelps Dodge, Okonite and Anaconda. These four, unlike KWC, had market acceptance and technical know-how, and had spent years in research on higher voltage cables, such as the very important 345 kv cable which recently reached the market. The government's evidence is that the volume of expected business at 345 kv is not sufficient to permit even four companies to operate profitably.

In 1958, there were also four producers of minor quantities and limited varieties of paper insulated power cables for lower voltages, Simplex, United States Steel, Colorado Fuel and Iron, and KWC. KWC was the smallest and least competitive of all and, after the acquisition, discontinued making these cables.

To become a serious contender in paper insulated power cables, KWC would have had to start building its plant from scratch at a new location. With the limited volume of available business, the increasing competition from other insulations, and KWC's lack of technical skill, there was no likelihood that KWC would undertake the expansion necessary to become a viable competitor in the manufacture and sale of paper insulated power cables. On the other hand, Okonite itself would not be a viable competitor today had it not been able to borrow $8 million from Kennecott in 1962 to re-equip completely its paper insulated power

cable facilities at the Paterson plant in order to remain competitive.

The district court's opinion and findings contain no discussion of competition in paper insulated power cables. There is no discussion of the probable future if Kennecott had not acquired Okonite. The court applied instead a *reauctio ad absurdum* to this Court's recent decision in *United States* v. *Aluminum Co. of America*, 377 U.S. 271, holding that a violation of Section 7 was proved because KWC's 2.1% was added to Okonite's 19.6%, based on this Court's finding of a violation when Rome's 1.3% was added to Alcoa's 27.8%.

But there is no basis for equating an obsolescent, unimportant and geographically mislocated KWC with progressive Rome, or equating a third-place, outdated Okonite, needing to expand in order to survive, with powerful first-place Alcoa.

The district court's two-page discussion of this important issue represents the application of a doctrine of *per se* illegality without reference to the evidence that combining Okonite (N.J.) and KWC had no potential for lessening competition. In fact, the subject of competition is not even discussed.

The unimportance of competition between Okonite (N.J.) and KWC before the Okonite acquisition was recognized by the government when it requested that the judgment require Kennecott to divest Okonite (Del.) as a single enti y, including the former KWC facilities at Phillipsdale, thereby perpetuating rather than seeking to undo the combination of these two companies.

2. The "Vertical" Facts

Copper is an international commodity freely traded in a world market. Free world production of copper has been increasing at a rapid rate, from 3,290,000 tons in 1954 to 5,300,000 tons in 1962, with new companies and new mines constantly increasing the available supply. The same trend has existed in the United States, where refined copper production increased from 1,418,000 tons in 1954 to 1,902,000 tons in 1962, with new companies and new mines furnishing most of the increase.

Kennecott's share of domestic shipments of refined copper declined from 33% in 1954 to 20% in 1962 (App. 14a fn.). No suggestion has been made in this case that the Okonite acquisition affected in any way Kennecott's position as a producer of refined copper.

The only question raised is the likely effect of Kennecott's acquisition of Okonite arising from the fact that it was a customer for refined copper. The district court found, as the evidence compelled, no effect on the availability of copper to users of that metal, and no effect on the ability of other copper producers to market their copper.

Okonite (N.J.) had purchased an average of 12,000 tons of refined copper per year, or about 0.3% of 1958 free world supply. This is the relevant statistic because refined copper is a fungible commodity which flows freely into and out of the United States, and Okonite (N.J.) had bought its copper largely from foreign sources. However, even confined to the domestic market, the average purchases of Okonite (N.J.) of 12,000 tons per year represented less than 1% of the demand side of the market (App. 14a fn.), while domestic production of refined

copper has been *increasing* at the rate of about 60,000 tons per year.

With this state of facts, it would seem clear that the acquisition of Okonite would have no adverse effect on competition in the line of commerce of refined copper.

How, then, did the district court conclude that the effect of the Okonite acquisition may be substantially to lessen competition in refined copper, particularly as the court found that Kennecott's percentage share of domestic shipments of refined copper had declined by about one-third between 1954 and 1962?

The district court made no finding of fact which could support the conclusion that the Okonite acquisition may adversely affect *competition* in refined copper. The district court avoided that question completely.

The court stated the problem it was considering as follows: "The problem is that a few big copper producers may buy up the available independent fabricators", and then discussed the possible effect of these hypothetical acquisitions on "the small copper producers' " ability to market their copper (App. 21a).

That question is completely different from the issue in this case—*i.e.*, the statutory question whether "the effect of such [the Okonite] acquisition may be substantially to lessen competition". Nor did the district court make any finding that the Okonite acquisition increased the likelihood that other copper producers would acquire other independent wire and cable fabricators; but without such a connection, the argumentation of the district court is completely unrelated to the Okonite acquisition.

The district court has, we believe unwittingly, in fact espoused a doctrine of *per se* illegality of vertical acquisitions. It is always possible to speculate that the acquisition of even a very minor customer would be followed by subsequent acquisitions by other companies of all of the other customers for that product, but if decision is permissible on such unsupported hypotheses, no vertical acquisition could survive.

The evidence is that (i) the Okonite acquisition did not increase the likelihood of further acquisitions, and (ii) there is no likelihood of further acquisitions by the leading copper producers.

1. Prior to the Okonite acquisition, Kennecott's leading copper competitors seemed to be internally expanding their wire and cable fabrication. At the same time, some of the independent fabricators, like Okonite, were viewing an uncertain future because of general industry overcapacity created during World War II and the Korean War and the slowdown of civilian postwar demand. Some of these independents, such as Okonite, for example, found themselves with obsolete or obsolescent plants and processes.

Kennecott was concerned by the possibility that independent fabricators—who in the aggregate accounted for 90% of Kennecott's sales of refined copper to the wire and cable industry—would lose position to Kennecott's integrated competitors, thus narrowing the available market for Kennecott's refined copper. This problem was sharpened when, shortly before the Okonite acquisition in 1958, it was learned that American Smelting & Refining Company ("Asarco"), a very large stockholder of Kennecott's largest wire and cable customer for refined

copper, General Cable Company, had embarked on a large venture for the production of copper in Peru.

At that time, Kennecott was engaged hardly at all in the use of copper in the fabrication of insulated wire and cable. General Cable's sales of insulated wire and cable were over fifteen times as large as those of KWC (Kennecott's wire and cable subsidiary); and the insulated wire and cable sales of Anaconda Wire & Cable Co. and Phelps Dodge Copper Products Corp. were each ten times those of KWC.

The competitive difficulties of Okonite (N.J.), described above, threatened its very existence. However, owned by Kennecott, Okonite (Del.) gives promise of being a viable competitor even though still very much smaller than General Cable, Anaconda or Phelps Dodge, and very much smaller than such independents as Western Electric, Essex, General Electric and General Motors.

The evidence was uncontradicted that Kennecott's ownership of Okonite since 1958 has not in any way affected the competitive position of the remaining independent fabricators and has had no effect on their ability or desire to remain independent. This was clear from the testimony of the government witnesses who were actually engaged in the wire and cable industry.

2. On the evidence, there is no basis for assuming that the Okonite acquisition would be followed by further acquisitions of wire and cable fabricators by major copper producers. General Cable (of which Asarco was a major stockholder), Anaconda and Phelps Dodge already had 7.9%, 5.8% and 5.0% of the insulated wire and cable market, and any acquisitions by Anaconda, Phelps Dodge

or Asarco would be subject to the application of Section 7 of the Clayton Act. There is, therefore, no reality in the district court's assumption that "a few big copper producers" could buy up the remaining independent fabricators.

3. By far the largest manufacturer of insulated wire and cable is Western Electric Company, a subsidiary of American Telephone & Telegraph Company. In 1958, the third largest was Essex Wire Corporation, a very large and profitable diversified company. The sixth largest was General Electric Company, and the seventh was General Motors Corporation. (Okonite was in eighth place.)

The vast resources of these enterprises, their very substantial positions as wire and cable fabricators, and the free availability of copper in the world market, do not permit serious speculation that they can be pushed out of the wire and cable industry, or that anyone would attempt to do so. It follows that there is no real likelihood that "a few big copper producers" may "buy up the available independent fabricators" with the result that there will be no independent customers for the small copper producers.

The alleged trend toward increased integration of copper production and fabrication that the district court assumes as a major factual premise (App. 7a) does not in fact exist. The refined copper shipped by Anaconda, Phelps Dodge and Kennecott—the three largest domestic copper producers—and consumed by their fabricating subsidiaries or divisions, including both wire mills and brass mills, represented a markedly declining percentage of total domestic shipments of refined copper before the acquisition of Okonite in 1958, and the declining trend continued after that acquisition. The percentages were 28% in 1955, 22%

in 1958, and 20% in 1961, even though shipments to Okonite are included for 1961 and not for the earlier years.*

4. The crucial finding of the district court is that small copper producers may some day find that they have no customers for copper. There is no evidence to support that finding, and that fear is shared neither by any of these copper producers nor, apparently, by the government.

Domestic copper producers, *other than* Kennecott, Phelps Dodge and Anaconda, have been constantly increasing their copper producing capacity in the obvious expectation of increasing sales. *New entrants* into domestic copper mining between 1953 and 1962 alone accounted for 246,000 tons of copper production in 1962.

The government, apparently concerned that the smaller copper producers may have too many customers, suggests that, upon divestiture of Okonite, the then independent Okonite be given a ten-year option to purchase copper from Kennecott, at its best price.

5. There is no evidence that the Okonite acquisition caused or worsened the plight of those few insulated wire and cable companies which were unable to make money because of industry overcapacity and intense competition. The progressive companies continued to make money.

6. The district court nowhere discusses *the effect of the Okonite acquisition* on competition in the refined copper

* The district court throughout discusses the case as though Anaconda, Phelps Dodge and Kennecott had jointly acquired Okonite, as a continuation of a common program of acquisition of independent wire and cable companies. The fact is that the latest acquisition by Anaconda was in 1929, and the only acquisition by Phelps Dodge was in 1930. Kennecott's only prior acquisition, of small KWC, was in 1935. There is no connection or interrelationship between Anaconda, Phelps Dodge and Kennecott.

industry. The court's rationale would apply equally if Kennecott had never acquired Okonite, and will be unaffected if Kennecott is required to divest Okonite.

The only difference would seem to be this: The court's unfounded fear that the independent wire and cable fabricator will cease to exist must also embrace the demise of an independent Okonite.* The district court does not, however, address the question: How would the small copper producer be advantaged by a demised independent Okonite?

There is no evidence that the acquisition of Okonite will lessen competition in refined copper. The district court based its decision on specious speculation which could be applied to any vertical acquisition and which, if adopted, would result in the application of a doctrine of *per se* illegality of vertical acquisitions contrary to the intent of the Congress and the decisions of this Court.

3. The Injunctive Provisions

Judge Dawson died shortly after filing his opinion, and the final judgment was framed by Chief Judge Ryan, without evidence of any necessity or desirability of an injunction against future acquisitions.

Nevertheless, the final judgment contains the following provision:

> "5. Defendant is hereby enjoined from acquiring the stock, assets or business of any company engaged in the production, fabrication or sale of refined copper or insulated wire and cable or paper

* This fear is unrelated to the Okonite acquisition (see App. 21a). The district court ignores the contribution to that fear arising from the vigorous competition of the aluminum companies which have historically been displacing copper with aluminum as the conductor metal for wire and cable.

> insulated power cable for a period of five years from the date of the accomplishment of the divestiture decreed by this Final Judgment, other than the purchases of the products of such companies in the normal course of business."

The judgment grants the government ancillary visitation rights for the same period of time.

This Court has declared that "Courts are not authorized in civil proceedings to punish antitrust violations, and relief must not be punitive." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326.

Whether an injunction against future violations is warranted depends on whether there is a real danger of recurrent violations:

> "The purpose of an injunction is to prevent future violations. . . . But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."

United States v. *W. T. Grant Co.*, 345 U.S. 629, 633. This Court there upheld the trial court's refusal to grant injunctive relief on the ground that "The District Court was not dealing with a defendant who follows one adjudicated violation with others." *Id.* at 634. Thus, an injunction against future acquisitions was denied in *United States* v. *Bethlehem Steel Corp.*, Civil No. 115-328, S.D.N.Y., and in *United States* v. *Brown Shoe Co.*, Civil No. 10527, W.D. Mo., and was not even requested in *United States* v. *Koppers Co.*, Civil No. Erie-792, W.D. Pa.

A principal problem in this case is that the injunction would prohibit lawful as well as possibly unlawful conduct, and thereby inhibit Kennecott's freedom to compete in a lawful manner. Neither competition nor the economy is served by such restrictions.

Without any evidence of either need or desirability, Kennecott is enjoined from acquisitions outside the United States which would have no effect on our domestic or foreign commerce. The injunction, as it relates to the production of refined copper, could well inhibit Kennecott's perfectly legal efforts to make copper available for consumers. Such an injunction, against lawful acquisitions, may be felt not only by Kennecott but also by the consumers of copper, and may inhibit activities abroad which would be in our own national interest.

B. The Questions Presented are Substantial

The district court's decision on the horizontal aspect of the case presents the question whether, contrary to repeated statements by this Court, a doctrine of *per se* illegality should be applied in the enforcement of Section 7 of the Clayton Act, *i.e.*, the mere fact that the number of competitors is necessarily reduced in a horizontal combination and that the combined enterprise initially has the market shares of both companies.

The district court's decision also casts doubt on this Court's prior decisions by disregarding the fact that KWC was not a significant competitor, and that, without financial help from Kennecott after the acquisition, Okonite would not be competitive today in the sale of paper insulated power cables (compare *Brown Shoe Co.* v. *United States, supra* at 319, 321-22).

An equally important question is the district court's approach to the acquisition, limiting its inquiry to a small gerrymandered fragment of a market in which both companies may have participated, although without significant competition, and then finding the entire acquisition illegal without regard to the pro-competitive effects of the acquisition in the larger market.

This is the first case where the government has sought to have a horizontal combination of two fabricators held unlawful because of the possibility of an adverse effect on competition, and at the same time sought as relief an injunction requiring that they be kept combined and not separated.

The question whether the prior decisions of this Court should be avoided by a doctrine of *per se* illegality arises not only with respect to paper insulated power cables but also in the refined copper line of commerce. Okonite represented an insignificant part of the demand side of the market for refined copper, and there is no claim that *the effect of the Okonite acquisition* may be substantially to lessen competition in refined copper. This is the first time that an acquisition has been held illegal because of the effect of possible future acquisitions by other companies.

The fact, noted by the district court and then ignored, that "the merger was primarily an advantage to Okonite rather than to Kennecott" (App. 23a), and that Okonite "had to expand to survive" (App. 7a), present important considerations not present in the decisions of this Court upon which the district court relied.

This is the only Court authorized to review the judgment below.

CONCLUSION

For the foregoing reasons, we respectfully submit that substantial questions are raised by this appeal and that probable jurisdiction should be noted.

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March 1965

APPENDIX

Opinion, Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 147-231

UNITED STATES OF AMERICA,

Plaintiff,

—against—

KENNECOTT COPPER CORPORATION,

Defendant.

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Opinion, Findings of Fact and Conclusions of Law

DAWSON, D. J.:

This case presents an issue as to whether the acquisition by a large copper producer of the assets of a substantial independent copper fabricator is a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, reading as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Pretrial proceedings resulted in the entry on September 11, 1963 of Pretrial Order No. 1. This order established that on November 24, 1958, and at all times thereafter, defendant Kennecott Copper Corporation had been a corporation engaged in commerce and subject to the jurisdiction of the Federal Trade Commission; that prior to November 24, 1958, Okonite Company (New Jersey) was a corporation engaged in commerce and subject to the jurisdiction of the Federal Trade Commission; and that on November 24, 1958, Okonite Company (Delaware) was and still is a wholly-owned subsidiary of the defendant Kennecott Copper Corporation; that on November 24, 1958, Okonite Company (Delaware) acquired the assets of the Okonite Company (New Jersey).*

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* The Okonite Company (Delaware) was formed for the purpose of acquiring the assets of the Okonite Company (New Jersey).

The parties stipulated that the Court had jurisdiction to determine whether this transaction violated Section 7 of the Clayton Act. They also stipulated that the relevant section of the country, within the meaning of Section 7 of the Clayton Act, for purposes of the litigation, was the United States of America as a whole.

It was further stipulated that relevant lines of commerce for purposes of the litigation were (a) insulated wire and cable and (b) refined copper.

It was further stipulated that plaintiff contended and defendant denied that (i) paper insulated power cable is a submarket of insulated wire and cable and (ii) that copper wirebar is a submarket of refined copper; and that each such submarket is in and of itself a line of commerce within the meaning of Section 7 of the Clayton Act for purposes of the litigation.

The pretrial order provided that the issues remaining for trial were:

I. Is paper insulated power cable an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?

II. Is wirebar an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?

III. May the fact of Kennecott's acquisition of Okonite result in a substantial lessening of competition or a tendency to monopoly in any line of commerce?

Those issues were tried. The Court now renders its opinion, findings of fact and conclusions of law.

In order that we may properly consider the significance of the evidence on these three issues, it is necessary at the

outset to describe the position of Kennecott Copper Corporation and the Okonite Company in the copper industry. On November 24, 1958, Kennecott Copper Corporation acquired the assets and business of the Okonite Company. Kennecott was at the time the world's largest copper producer. It admitted in its answer that it is the largest domestic copper producer. Okonite was the country's second largest independent insulated wire and cable fabricator. Since its acquisition Okonite Company has operated as a wholly-owned subsidiary of Kennecott. About a month after the acquisition of Okonite, Kennecott transferred its subsidiary, Kennecott Wire and Cable Company (KWC), to Okonite.

The basic steps in the copper industry are mining, milling, smelting, refining and fabrication. There has been a tendency in the industry toward integration in the major companies of all these steps. Kennecott is completely integrated through smelting and largely integrated through refining. It owns five mining properties located respectively in New Mexico, Nevada, Arizona, Utah and Chile. It owns a refinery at the Utah location which refines the Utah production and a refinery in Maryland which handles most of the output of the other properties. The American Smelting & Refining Company is under contract to refine the remaining production. Integration through refining now appears to be a general rule in the industry in the large companies at least. Anaconda and Phelps Dodge had become integrated through refining at an earlier date than Kennecott.

Kennecott is also integrated to some extent through fabrication. Prior to its acquisition of Okonite, Kennecott

had two wholly-owned subsidiaries engaged in copper fabricating operations, Chase Brass & Copper Company, Inc. and Kennecott Wire and Cable Company. These two subsidiaries reflected the two basic industries which are customers of refined copper, i.e., wire mills and brass mills. In 1958, 59.2% of refined copper consumption in the United States was by wire mills and 38.3% by brass mills.

In the years preceding the merger Kennecott was in general satisfied with its position in the brass mill industry. Chase Brass & Copper Company had 12-13% of the industry and consumed almost 40% of Kennecott's shipments of copper to brass mills. It had a young and alert management and was well able to expand, not only to maintain the company's share of the market, but to improve the company's position.

Kennecott was not satisfied with its position in the wire and cable industry, however. Its subsidiary in that field accounted for less than 2% of wire and cable sales and consumed only about 10% of Kennecott's shipments to wire and cable companies. Kennecott felt that in order to maintain or increase its competitive position in the wire and cable industry it would have to expand. It also felt it had to expand its fabrication facilities in order to market its copper.

In a memorandum to Kennecott's Board of Directors, the executive vice president of Kennecott stated in 1958:

> " . . . In general, Kennecott's competitors in this hemisphere have been increasing their fabrication facilities through new plants and through acquisitions of fabricators. Some independent fabricators feel that they will in the future be squeezed

> by the integrated companies in their efforts to market their copper production.
>
> "It, therefore, appears essential if Kennecott is to be able to sell its mine production of copper that Kennecott acquire additional fabrication to replace fabricating accounts which it will lose or which will purchase only reduced quantities from Kennecott."

In early 1958 contact was established with the Okonite Company and merger negotiations began.

Okonite was the second largest of the independent insulated wire and cable companies at the time it was acquired. Only Essex Wire & Cable was larger in the independent field. General Cable Company was also larger, but it had a close relationship with American Smelting & Refining Company which owned roughly one-third of its common stock and therefore in the industry was not considered an independent.

Okonite's manufacturing operations were carried on in three plants located at Passaic, Paterson and North Brunswick, New Jersey. It also had a nationwide chain of sales offices located in the principal cities of the country and warehouses in Birmingham, Chicago, San Francisco and Syracuse.

The Okonite management was young and progressive and was reputed to be one of the most able in the industry. As an independent, Okonite relied on research, leadership in engineering and a reputation for quality to help market its products and to earn premium prices where possible. It claimed to be a leader in its field in terms of know-how and production ability. Its product line was quite broad compared with other independent wire and cable companies.

Refined copper was Okonite's principal raw material. Most of the refined copper was purchased in the form of wirebar or the products of wirebar. It had no rod mill. In 1954 and 1955 Kennecott was Okonite's principal copper supplier, but Okonite's purchases from Kennecott declined steadily from 1954 on. Okonite purchased 3,975 tons of copper from Kennecott in 1954; 2,959 tons in 1955; 1,961 tons in 1956 and 150 tons in 1957. There were no purchases in 1958 up to the time of the merger.

Kennecott's main purpose in expanding in fabrication was to assure a future market for the sale of its copper. In a memorandum sent by the executive vice president to Kennecott's board of directors in 1958, he wrote:

> "It is recommended that Kennecott acquire The Okonite Company, producers of insulated wire and cable, because the additional fabrication capacity will be essential to the future marketing of Kennecott's refined copper and will also provide a second profit on copper produced."

Okonite was interested in the merger for financial reasons. It felt it had to expand to survive and that Kennecott could supply the necessary capital.

We had, therefore, dynamic, economic forces which tended to promote integration in the industry. It was in response to those forces that this merger took place. This tendency existed in the entire copper industry. The other two big copper producers in the United States are Anaconda and Phelps Dodge. In 1922 Anaconda acquired the predecessor company of Anaconda Copper & Brass Company because it was convinced that in order to protect the

business of the company it should be placed in a position to control the outlets of its metals and to promote the sale and distribution of copper and brass products. Anaconda, in 1929, formed the Anaconda Wire & Cable Company by a series of acquisitions. Phelps Dodge acquired a copper product subsidiary as a result of acquisition in 1930. It was this tendency toward integration on the part of its two largest competitors that spurred Kennecott into the acquisition of Okonite. Mr. Milliken, the president of Okonite, testified (Tr. 2355-56):

> "Well, we thought we had a problem because, as I say, of this tendency on the part of our competitors in this country, Anaconda and Phelps Dodge, expanding their capacity, and also what seemed to be the attitude of the independents that they couldn't make money in copper fabrication. If those two things were carried to a, let's say, ultimate conclusion, then we would be in serious trouble."

We will now proceed to a consideration of the issues which were set for trial:

> I. *Is paper insulated power cable an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?*

Section 7 of the Clayton Act is designed to prevent any corporation from purchasing stocks or assets of another corporation when the effect of such acquisition would be substantially to lessen competition or tend to create a monopoly in any line of commerce in any section of the country. A determination of the effect of the acquisition

necessarily presupposes that there be a determination of the line of commerce involved. It was stipulated in the pretrial order that among the relevant lines of commerce for the purposes of this litigation were (a) insulated wire and cable and (b) refined copper. The Government, however, contends that *paper insulated* power cable is an appropriate sub-line of commerce.

Certain practical indicia may be examined to determine whether a submarket exists in a line of commerce. Those which were identified in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), at page 325, were as follows:

> "[I]ndustry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

It has also been said by the Supreme Court that within a broad market "well defined submarkets may exist, which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962).

The question presented on this point is whether or not paper insulated power cable is a sufficiently distinctive submarket of insulated wire and cable to constitute a line of commerce in and of itself. The common physical characteristic of all types of paper insulated power cable, which distinguishes it from other types of power cable, is that the insulation of paper insulated power cable is made of strips of high quality paper which are wound around the conductor and impregnated with a highly refined insulating oil

compound. The electrical conductor in paper insulated power cable is almost always made of copper. The use of copper results in a smaller diameter cable for a given voltage capacity. This is important because paper insulated power cable is normally used in underground ducts where space limitations can make the cross-sectional size of the cable important. To persons familiar with electrical cable, paper insulated power cable is easily distinguishable in appearance from other types of power cable.

The manufacture of paper insulated power cable is generally recognized in the industry as a separate segment of the insulated wire and cable business. A company's ability to manufacture paper insulated power cable is regarded as a mark of status by others in the industry. A certain amount of prestige is attached to a firm's ability to fabricate paper insulated power cable.

The National Electrical Manufacturers Association, the industry's trade association, devotes part of its statistical program to the collection and publication of separate data on paper insulated power cable. While it collects data for insulated wire and cable generally, paper insulated power cable is shown as a separate category. In 1958 and 1962-63, this trade association recommended to the Bureau of the Census that paper insulated power cable be classed as a separate product in the Census list, and in 1958 Kennecott and Okonite joined in that recommendation.

Paper insulated power cable is used to carry high voltages of electrical power. The great bulk of it is used to trunk power at high voltages underground for utility networks. In the main, paper insulated power cable has no

effective competition in the area of its major use from other types of insulated power cable.

The evidence was that, in manufacturing, specialized machines are used for the production of paper insulated power cable and that without specialized paper taping machines and oil impregnating equipment a fabricating company cannot manufacture paper insulated power cable. As a result, ordinary manufacturers of insulated wire and cable cannot make paper insulated power cable because, among other things, they lack the proper machinery and equipment.

In addition to specialized equipment, the manufacture of paper insulated power cable requires special engineering technical know-how. The manufacturing skills which are necessary to produce paper insulated power cable differ from those skills necessary to produce insulated wire and cable generally.

There are distinct customers for paper insulated power cable, largely the electric utility companies. Because utilities are the principal users of paper insulated power cable, the Association of Edison Illuminating Companies promulgates the standard specifications for paper insulated power cable, whereas specifications for other types of power cable are promulgated by the Insulated Power Cable Engineers Association.

There is an identifiable group of companies in the industry engaged in the manufacture of paper insulated power cable which is much more limited than the number which makes other types of cable. The only domestic manufacturers of paper insulated power cable are: Okonite, General Cable, Anaconda Wire & Cable, Phelps Dodge Copper Products, Simplex, American Steel & Wire Division of United States

Steel Corporation, John A. Roebling's Sons Division of Colorado Fuel & Iron Corporation, Reynolds Metals and Kennecott Wire and Cable. However, only the first four companies are manufacturers of full line paper insulated power cable. Each of the four principal paper cable manufacturers—Okonite, General Cable, Phelps Dodge and Anaconda—has issued a paper cable price book. Each company sells paper insulated power cable under identical instructions and under a complex pricing formula based on such factors as the price of copper, the price of lead and the price of insulation, and each company uses the identical pricing formula.

The above examination of the "practical indicia" referred to in *Brown Shoe* establishes that there is no reasonable interchangeability of use between paper insulated power cable and other insulated wire and cable. Paper insulated power cable is therefore a sufficiently distinctive submarket of insulated wire and cable to be considered a line of commerce in and of itself.

II. *Is wirebar an appropriate line of commerce within which to measure the probable effects of Kennecott's acquisition of Okonite?*

Wirebar is a particular shape in which refined copper is sold. It comes in various sizes. Basically the product is the same copper that is used in other shapes. The facilities used to refine the copper are identical no matter what shape is sold. To produce the various shapes, however, molds are required. Unique molds are used to cast wirebar, but there was no indication at the trial that sep-

arate mills were necessary nor that the molds involved any substantial investment. Copper refiners sell refined copper in various shapes but the vendors of wirebar are no more and no less specialized than the vendors of refined copper generally.

Wirebar is primarily used for the production of wire. The Bureau of Mines figures show that wire mills as a group consume over 92% of all wirebar.

The evidence was that sales contracts for refined copper commonly provide only for the sale of electrolytic or fire refined copper, and do not specify any particular shape. The particular shape desired by the customer is designated by the customer after the contract is executed, and it is immaterial to the copper refiner which shape or shapes it delivers.

Refined copper is sold by the pound. There may be some variation in prices due to extra charges for casting in unusual sizes or shapes, but this variation is minimal. The price behavior of wirebar is identical to the price behavior of refined copper generally.

Since it has been stipulated that an appropriate line of commerce for the determination of this action is refined copper, the particular shape in which the copper is sold becomes somewhat immaterial. Some purchasers may want the copper in the form of wirebar; other customers may wish it in other forms. The manufacturing skills which are necessary to produce wirebar are no different from those required to produce refined copper generally. The prices of wirebar are the prices of refined copper.

Kennecott, as a copper producer, shipped its copper in various forms, of which wirebar was an important sec-

tor. Its share of wirebar shipped in the domestic market was 23.7% in 1954, 20.9% in 1955, 21.2% in 1956, 19.9% in 1957, 20.9% in 1958, 16.9% in 1959, 18.3% in 1960, 22.1% in 1961 and 19.1% in 1962.

Okonite did not produce or sell wirebar. It was a purchaser of wirebar. It purchased copper in both the form of wirebar and rods. The receipts of wirebar and rod were 1.4% of total domestic shipments in 1954, 1.4% in 1955, 1.7% in 1956 and 1.6% in 1957.

In order to measure the probable effect of Kennecott's acquisition of Okonite, the Court may take into account the purchases by Okonite of refined copper from Kennecott and the percentage thereof which is sold in the form of wirebar. There is no significant difference in the positions of Kennecott and Okonite in the wirebar market from their positions in the refined copper market. Kennecott's shipments of wirebar are a slightly lower percentage of the industry total than are its shipments of refined copper, but Okonite's receipts are a slightly higher percentage.*

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* The parties have presented the Court with two alternate theories as to how to compute the total shipments of refined copper. Plaintiff contends that shipments are equal to consumption of refined copper as reported to the U.S. Bureau of Mines. Defendant contends that shipments are equal to production, less exports, plus imports, adjusted for annual inventory changes. Valid arguments have been presented upholding both sets of figures. Both methods appear to be equally accurate, and there is very little difference between the two sets of figures. Using the arithmetic average of the two sets of figures presented by the parties, Kennecott's share of the refined copper shipped in the domestic market has been 33.0% in 1954, 28.0% in 1955, 25.4% in 1956, 23.0% in 1957, 23.0% in 1958, 17.7% in 1959, 20.9% in 1960, 22.6% in 1961 and 20.2% in 1962. The receipts of refined copper by Okonite were .76% of total domestic shipments in 1954, .80% in 1955, 1.0% in 1956, and .96% in 1957.

Since there was no competition between Kennecott and Okonite in the sale of wirebar, and in view of the foregoing facts, it seems unnecessary to consider wirebar as a separate submarket for the purposes of this action. This is not to say that under particular circumstances the form in which a product is cast may not constitute a submarket in and of itself. However, in the present situation, the market obviously was one of refined copper. This has been stipulated as a line of commerce by the parties and represents the proper factual situation.

The Court holds that wirebar is not an appropriate line of commerce, as such, within which to measure the probable effect of Kennecott's acquisition of Okonite.

III. *May the effect of Kennecott's acquisition of Okonite result in a substantial lessening of competition or a tendency to monopoly in any line of commerce?*

This case involves the potential lessening of competition in the horizontal aspects of the industry and also in the vertical aspects of the industry.

(a) Horizontal Aspects of the Case

In this aspect of the case, paper insulated power cable is the line of commerce which is particularly significant. Before the merger there were nine companies which produced paper insulated power cable. Four of the nine controlled roughly 90% of the volume. The big four were: General Cable Corporation, Phelps Dodge Copper Products Corporation, The Okonite Company and Anaconda

Wire & Cable Company. In the year of the merger Kennecott was the eighth largest of the nine producers in this field in the net sales of paper insulated power cable. The respective positions of the companies are shown in Government Exhibit 405.

However, a significant fact which must be taken into account is that the four big companies in the field controlled roughly 90% of the market. The percentage controlled by the four was 86.3% in 1954, 88.5% in 1955, 88.5% in 1956, 89.5% in 1957, 90.1% in 1958, 92.9% in 1959 (when KWC and Okonite merged), 89.0% in 1960, 91.6% in 1961, and 92.5% in 1962.

We have, therefore, considering the net sales of this product to domestic purchasers in the year of the merger, a merger of the Okonite Company, the third largest, with Kennecott, the eighth largest. Okonite's percentage of net sales in this line of commerce in the year of the merger was 19.6%; Kennecott's percentage of the net sales in this line of commerce in the year of the merger was 2.1%.

The language used by the Court in *United States* v. *Aluminum Company of America*, —— U.S. —— (1964), is appropriate to this case:

> "In other words, the line of commerce showed highly concentrated markets, dominated by a few companies but served also by a small, though diminishing, group of independents.
>
> * * * * *
>
> "The acquisition of Rome added, it is said, only 1.3% to Alcoa's control of the aluminum conductor market. But in this setting that seems to us reason-

> ably likely to produce a substantial lessening of competition within the meaning of § 7. It is the basic premise of that law that competition will be most vital 'when there are many sellers, none of which has any significant market share' *United States* v. *Philadelphia National Bank*, 374 U.S., at 363."

Under the test laid down in *United States* v. *Aluminum Company of America, supra*, it would appear that in the horizontal aspects of this case Kennecott's acquisition of Okonite may result in a substantial lessening of competition in the paper insulated power cable line of commerce.

(b) Vertical Aspects of the Case

Essentially, as has been stated, this case involved the acquisition by a copper producer of a copper fabricator. It is a continuation of that tendency toward integration which has existed in the copper industry and which exists in many other industries. In the vertical aspects of the case we are not concerned with competition between the two merging companies but rather what the effect would be in the industry so far as its lines of commerce are concerned. We are here dealing with the question as to what Congress meant by "competition" in Section 7 of the Clayton Act. We must look to the history of the act and the interpretation of the act for guidance. Chief Justice Warren, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), at page 344, stated:

> "... [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices

> might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."

Judge Learned Hand in 1945 made much the same point when he said:

> "Throughout the history of these statutes [the anti-trust laws] it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir.) at p. 429.

Thus we are concerned not alone with the probable effects of a merger upon a particular line of commerce but also its probable effects upon the economic way of life in the industry.

> "Moreover, as we have remarked above, not only must we consider the probable effects of a merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 333 (1962).

This Court has heretofore pointed out that:

> "The natural consequence of the profit motive in a competitive society is to lead businessmen to explore the possibilities for greater profits which might be derived from an amalgamation of competitive units,

> with an anticipated reduction of costs, and the establishment of a position of leadership and power in an industry which will be relatively unaffected by the competitive rivalry of smaller firms. Economists have recognized that the vigor of a competitive system exerts a centripetal force which tends, for reasons of self-interest of the parties involved, to bring about an amalgamation or union of the competitive units. Against this centripetal force the anti-trust laws have interposed a centrifugal force designed to keep the units separate and distinct and to halt the tendency toward amalgamation and union which otherwise might exist, and which, if allowed to run an unrestrained course, might result in a cartelized industrial organization which would be destructive to that individual enterprise which is regarded by most Americans as a touchstone of progress." *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, at p. 396 (S.D.N.Y. 1957).

In fact, if our economic system of free enterprise is to survive, it is probably necessary for the Government to interpose itself in those situations where the natural force of economic rivalry tends toward undue concentration. Those who believe in Marxian economics, believe that the tendency toward monopoly is inevitable.* It is to withstand these economic pressures that Congress has enacted the antitrust

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* See, *"The Coming Struggle for Power,"* by John Strachey (New York, The Modern Library, 1935): ". . . No sooner has capital been accumulated to a considerable extent than the free and independent producers for the market . . . begin to 'get together.'" (At page 66). ". . . What, however, is indisputable is that the whole of American economic life is steadily coalescing and congealing into a vast conglomerate mass from which competition tends to be expelled. . . ." (At p. 74).

laws. The economic forces which lead to amalgamation and integration of large industries are very real forces. They may indeed be desirable forces. They often lead to economic and efficient operation. It is no answer to say that such processes are desirable from an economic standpoint, for Congress has said that the tendency is undesirable from a social standpoint, and we must enforce the law as Congress wrote it and as Congress intended that it be enforced.

Competition has been defined as "the process of exchanging goods or services in a market where there is a choice of rival bids and offers." *Kaplan, Big Enterprise in a Competitive System,* 42 (1954). To maintain a choice of rival bids and offers it is necessary to maintain the number of effective competitors in the market.

There is no one definition of competition. Economists do not agree over the meaning of the term nor do they agree how it can be achieved. However, in the legislative debate over the 1950 amendment to Section 7, great emphasis was placed on the undesirability of the political and sociological implications of mergers and of concentration and the desirability of the preservation of small business and dispersion of economic power. Although the meaning of "competition" was not discussed, the debate suggests reliance upon a structural theory of competition which stresses the advantages of a large number of small-sized businesses.

In the course of debate the evils of undue concentration in the copper industry were repeatedly cited as examples of what the amendment was intended to stop.*

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* E.g., 95 Cong. Rec. 11485 (1949) (remarks of Representative Celler); 95 Cong. Rec. 11489 (1949) (remarks of Representative Keating); 95 Cong. Rec. 11500 (1949) (remarks of Representa-

The problem is that a few big copper producers may buy up the available independent fabricators. Fabrication would then cease being a small business field and would be dominated by a few giant corporations which produce their own copper.* The remaining independent fabricators would fail because they could not compete against fabricators with assured sources of supply and large amounts of capital. The small copper producers would then have no place to market their product and would fail, increasing the concentration among producers as well. This has not happened yet, but Kennecott was worried enough about the continued existence of the independents that it felt that it had to capture one for itself.**

Kennecott's acquisition of Okonite has in fact operated to foreclose Okonite as a customer to other copper suppliers. Okonite's copper requirements, over and above that pur-

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tive Douglas); 95 Cong. Rec. 11502 (1949) (remarks of Representative Biemiller); 96 Cong. Rec. 16436 (1950) (remarks of Senator O'Connor). See also H.R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949) (". . . no less than 70 percent of the long-term growth (1915-45) of the three largest companies [in the copper industry] Anaconda, Kennecott, and Phelps-Dodge, has been due to external expansion through acquisitions and mergers.")

* A similar situation in the steel drum industry was cited in debate on the floor of Congress as one case of undue concentration caused by merger activity. See 95 Cong. Rec. 11497 (1949) (remarks of Representative Boggs); 95 Cong. Rec. 11507 (1949) (remarks of Representative Byrne); 96 Cong. Rec. 16502-3 (1950) (remarks of Senator Kefauver).

** Paradoxically competition can also be lessened through the process of competition itself. The few big copper producers may be able to achieve the same result through internal expansion. This route is not forbidden by the Clayton Act, however. Presumably Congress felt that this route was inherently more justifiable. It is also more difficult to achieve and more difficult to prevent.

chased under Okonite's contractual arrangements existing at the time of the merger have been purchased from Kennecott since the merger, and it is expected that this will continue. Okonite is now obtaining virtually all of its copper requirements from Kennecott.

Okonite did not have a rod mill before the merger. It purchased its copper in the form of rod or in the form of wirebar which it had rolled into rod on a toll basis. Okonite was dissatisfied with this arrangement and was planning to build a rod mill. KWC on the other hand had a rod mill, but KWC's sale of rods to others had been limited to a few customers at low tonnages. As a result of the merger, Okonite dropped its plans for a rod mill and now the KWC mill rolls rods for the merged company.

In addition, the acquisition has added to the problems of Okonite's competitors. Since 1958, insulated wire and cable prices have been continuously falling due to overcapacity. This has been an industry-wide situation except for paper insulated power cable. Meanwhile the price of copper has remained relatively stable. Profit margins on insulated wire and cable have therefore dwindled so that many companies are now showing losses.

The integrated companies obtain the copper raw material at their cost of production, while the nonintegrated companies must pay the market price and then process the wirebar into wire and cable and sell it at a competing price with the integrated company. The integrated companies thus have an opportunity for profit in the production of the metal to justify their staying in a market in which there is a squeeze on fabrication, whereas the nonintegrated companies have no alternative opportunity for profit.

Thus the merger was primarily an advantage to Okonite rather than to Kennecott. Kennecott would have been better off in the short run selling to the independents and reaping the full profit in copper. But in the long run Kennecott feared that the independents might cease to exist. As a result of this fear Kennecott has made the problem even worse by removing an independent from the market and then competing with the remaining independents.

The Government contends that an additional evil exists on the Okonite level. The Government asserts that when copper has been in short supply, Kennecott has favored its own subsidiaries and that it will continue to do so. Evidence was received concerning the competitive situation existing during two periods of copper shortage, 1955-6 and 1959. The evidence does not support the Government's contention.

During periods of shortage Kennecott has sold its copper on an allocation system based on past purchases. Kennecott allocated copper to its own fabricating subsidiaries on the same basis as to its independent customers. It was in Kennecott's self-interest to do so. If Kennecott were to discriminate against its independent customers, it would severely damage its own business. Dissatisfied customers would not return when the period of shortage had passed.

In this case there is neither any claim nor any evidence that integration between copper production and fabrication results in cost savings. The advantages of the integrated companies in this case stem from economic power, not efficiency.

Integration through fabrication in the copper industry has already proceeded to an alarming degree. Copper pro-

duction is dominated by three companies, Kennecott, Anaconda, and Phelps Dodge, which together produced roughly 60% of the industry total during the period 1954-1958.* In 1958, the year of the merger, 25.3% of Kennecott's shipments of refined copper were to KWC and Chase. 76.8% of Phelps Dodge's shipments and 93.7% of Anaconda's shipments** were to their own fabricating facilities.*** The integration had proceeded so far that any significant increase among the big three by merger is highly suspect.

Before the acquisition of Okonite, Kennecott, Phelps Dodge and Anaconda were dominant in copper production, and Kennecott was the only one of these major producers which relied upon independent fabricators for a substantial part of its copper sales. Phelps Dodge and Anaconda were expanding their fabricating capacity. Kennecott feared that the independent fabricating companies would sell out to copper producers or switch into other kinds of business. Therefore Kennecott bought Okonite to preserve a market for its copper.

In short, the rationale of the acquisition was that there is no future in the copper industry for an independent in-

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* Figures are not available after 1958.

** Inspiration Consolidated Copper Co. sent 40% of its shipments to the subsidiaries of Anaconda. Anaconda has a 28.17% interest in Inspiration. If Inspiration and Anaconda are taken as a group, 82.3% of their shipments were to their own fabricating facilities.

*** Not all of the refined copper shipped was consumed by the subsidiaries, however. Some of the wirebar was rolled into rod and sold in that form to independent fabricators for further processing. In 1958, 36.1% of Phelps Dodge's shipments and 90.6% of Anaconda's shipments were ultimately consumed by their own fabricators.

sulated wire and cable fabricator, so the sooner the integrated companies become the dominant fabricators the better. The antitrust laws say otherwise, however. The fundamental purpose of Section 7 of the Clayton Act is to halt just such increasing concentration.

Kennecott's acquisition of Okonite seems likely substantially to lessen competition, or to tend to create a monopoly in both refined copper and paper insulated power cable in the United States.

Conclusions of Law

1. The Court has jurisdiction over the parties and jurisdiction to try the matter charged in the complaint.

2. The following are appropriate lines of commerce within which to measure the probable effect of Kennecott's acquisition of Okonite:

(a) Insulated wire and cable

(b) Paper Insulated power cable

(c) Refined copper.

3. As to each of the lines of commerce, the United States as a whole is the appropriate section of the country within which to assess the probable effect of Kennecott's acquisition of Okonite.

4. The effect of Kennecott's acquisition of Okonite may be substantially to lessen competition in the line of commerce of paper insulated power cable in the United States in violation of Section 7 of the Clayton Act.